Supreme Court, U.S.
FILED
MAY - 3 2002
OFFICE OF THE CLERK

(5)

No. 01-1231

In The

Supreme Court Of The United States

October Term, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C., LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*RICHARD BLUMENTHAL
Attorney General of Connecticut
GREGORY T. D'AURIA
Associate Attorney General
MARGARET Q. CHAPPLE
HENRI ALEXANDRE
LYNN D. WITTENBRINK
PERRY ZINN-ROWTHORN
Assistant Attorneys General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5020

**Counsel of Record*

service by
BRESCIA'S
CALL 800.842.0008

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....i

ARGUMENT.....1

TABLE OF AUTHORITIES

Cutshall v. Sundquist, 193 F.3d 466 (6th Cir.1999).....passim

Paul v. Davis, 424 U.S. 693 (1976).....passim

Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1990), *cert. den. sub nom. Stearns v. Gregoire*, 523 U.S. 1007 (1998).....passim

ARGUMENT

The petitioners hereby reply to Respondent's Brief in Opposition to their petition for certiorari to address briefly the Respondent's claim that no split of authority exists among the circuits or elsewhere. The respondent appears to be alone in this view. The Solicitor and the many amici states feel strongly that this split exists and wish for this Court's guidance on the issues posed. In fact, the Second Circuit itself admitted that its sister circuits have indeed considered the same constitutional issue presented to this Court in the petition for certiorari and decided it differently. *See*, *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied sub nom. Stearns v. Gregoire*, 523 U.S. 1007 (1998).

As discussed in the petitioners' opening brief, Connecticut, like every other state in the union, has enacted a Sexual Offender Registration Act (hereinafter "SORA"). Connecticut's Act requires persons convicted of various sexual and related offenses to "register" with the state law enforcement agency, providing fingerprints, photo, and/or personal information such as address to be included within the State's Sexual Offender Registry. Connecticut, also like every other state, has legislated a manner in which Registry information shall be available to the public, choosing an "information-on-request" system that makes Registry information available both at local police stations and troops and on-line. Although a number of states have chosen a system for information dissemination similar to Connecticut's, other states have implemented tiered systems, whereby convicted offenders are ranked in categories attempting to relate to the likelihood of their re-offense, and then various

levels of information on different registrants are either provided or made available to the public depending on the determination of that likelihood. Some states have mixed versions of these two models. See Petitioners' brief, pp. 14-16.

The plaintiff challenged Connecticut's law as violating his right to procedural due process. Acknowledging the "stigma-plus" test enunciated in *Paul v. Davis,* the plaintiff claimed that Connecticut's web site falsely "stigmatized" him by making accurate information available to the public along with accurate information regarding other convicted sexual offenders, and thus "implying" that he is currently dangerous. The plaintiff originally argued that the "plus" element in Connecticut's statutory scheme could be found in all of several negative effects allegedly inuring to the registrant as a result of the availability of Registry information, claiming but never having to prove a negative effect on employment prospects, family relationships, harassment or abuse of registrants, and an alleged Connecticut constitutional right to reputation. A-56, n. 23.[1/] In addition, the plaintiff alleged that the underlying registration requirements themselves, that is, the requirements surrounding the provision of information by a registrant about himself to the Connecticut State Police, such as the provision and update of address information as well as the production of a photograph at least every 5 years, or be subject to arrest for a

---

[1/] See, Fourth Am. Comp. ¶ 79(f), Pl. App. 19, alleging "a multitude of possible adverse consequences...including shame, humili[]ation, ostracism, loss of employment, decreased employment opportunities, loss of housing, interference with family and social relationships, and *possible* physical harm inflicted by members of the public who believe that plaintiff and the class members pose a threat to public safety." (emphasis added).

Class D felony,[2/] satisfied the "plus" portion of the *Paul v. Davis* liberty interest test, that, when coupled with the availability of information, was sufficient to invoke procedural due process protection. It was this argument that the courts below accepted, despite the fact that both the existence of the "stigma" and the "plus" were highly questionable under a conscientious application of *Paul v. Davis* and its progeny. The due process analyses of both courts below are flawed in that they find "stigma" in an "implication" of dangerousness, despite explicit language to the contrary, and stretch to find that the "plus" element is satisfied in the registration requirements, which do not flow from the Registry that the district court shut down and made publicly inaccessible.

The Second Circuit conceded: "It is true that the Sixth and Ninth Circuits have not found a liberty interest in analogous circumstances. *See Cutshall; Russell v. Gregoire, supra*. A substantial number of District Courts have held similarly." A-32, citations omitted. Attempting to minimize the distinction, the Second Circuit then stated, "However, these Courts have *not necessarily disagreed* with the contention that the ongoing legal obligations of sex offenders registrants constitute a 'plus' factor. Neither the Sixth Circuit in *Cutshall* nor the Ninth Circuit in *Russell* was presented with such an argument." A-32-33 (emphasis

---

[2/] The plaintiff argues, as did the Second Circuit, that the cumulative nature of the registration requirements for a variety of criminal offenses render the statute unconstitutional. Pl. Br. at 15, citing *Doe v. Dep't of Public Safety*, 271 F.3d at 57 ("These obligations taken together easily qualify as a 'plus' factor under *Paul v. Davis.")* This argument is disingenuous at best, as the plaintiff is certainly unlikely to concede that paring down either the registration requirements or the list of criminal offenses requiring registration would make Connecticut's law constitutionally sound.

added). Although those cases themselves did not address the narrow question of whether or not the registration requirements were sufficient to satisfy the "plus" portion of the "stigma-plus" test, it is indisputable that both Tennessee (*Cutshall*) and Washington (*Russell*) have and had registration requirements similar to those of Connecticut in place for sex offenders.[3/] Moreover, it is indisputable that both

---

[3/] The Tennessee law at issue in *Cutshall* required:

> [E]ach sexual offender shall complete a . . . sexual offender registration/monitoring form and shall cause such form to be delivered to TBI headquarters in Nashville. Sexual offender registration/monitoring forms shall require disclosure of the following information: 1) Complete name as well as any alias; 2) Date and place of birth; 3) Social security number; 4) State of issuance and identification number of any valid driver license; 5) For a sexual offender on supervised release, the name, address, and telephone number of the registrant's parole Officer, probation Officer, or other person responsible for the registrant's supervision; 6) Sexual offense or offenses of which the registrant has been convicted; 7) Current place and length of employment; 8) Current address and length of residence at such address; 9) Such other registration and/or monitoring information as may be required. .

Cutshall, 193 F.3d at 470. The Washington law in *Russell* required:

> Any person convicted of a sex offense . . . [must] register with the sheriff for the county of the person's residence. Wash. Rev. Code § 9A.44.130(1). The offender must provide his or her name, address, date and place of birth, place of employment, crime for which he or she was convicted, date and place of conviction, aliases used, and social security number. . . . The sheriff must obtain a photograph and a copy of the offender's fingerprints. . . . The information is forwarded to the Washington State Patrol for inclusion in a central registry. . . . *Failure to register within the time required is punishable as a Class C felony or gross misdemeanor depending on the degree of the offender's underlying sex offense.* *Id.* at § 9A.44.130(7).

Russell, 124 F.3d at 1082 (emphasis added). Connecticut's SORA does not require registrants to provide employment information. A-78-103.

the Sixth and Ninth Circuits considered the same legal issue as the Second Circuit considered: whether a statutory scheme involving the provision of registration information by sex offenders to the State and the subsequent provision of that registration information by the State to members of the public[4/] collectively amounts to a violation of the offender's right to procedural due process. More specifically, all three Circuits specifically considered whether or not such a statutory registration scheme satisfies the "stigma plus" test for a liberty interest sufficient to invoke due process that this Court set forth in *Paul v. Davis,* 424

[4/] The plaintiff claims that the petitioners' argument regarding access to public information is an "Eleventh Hour Effort to Recharacterize" their arguments that were previously all based in "public safety". Pl. Br. at 22-24. This is blatantly untrue. The State of Connecticut has consistently argued the public information aspects of this case at every level. In both submissions below, the petitioners argued that Connecticut Freedom of Information laws required public accessibility to the electronically maintained Registry and that the Registry Internet web site simply made already public information more easily accessible to the public. (Defendants' Brief Below at 8-9, citing Conn. Gen. Stat. §§ 1-210; 54-142k(b); and 1-211 (regarding public accessibility to computer stored records); (Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment 10-11.) In addition, this argument is irrelevant to the appropriateness of certiorari.

U.S. 693 (1976). *See, Doe v. Public Safety,* A-14-A-33; *Cutshall*, 193 F.3d at 479-480;[5/] *Russell*, 124 F.3d at 1094.[6/]

[5/] In *Cutshall*, the Sixth Circuit considered the existence of a liberty interest in light of the plaintiff's allegations in that case that Tennessee's SORA "deprive[d] him of employment and privacy". 193 F.3d at 479. The Sixth Circuit did not find the employment argument persuasive, noting that Tennessee did not place any restriction on private employment. *Id.* at 479. The Sixth Circuit noted further that Tennessee's registration law did not prevent registrants from obtaining *government* employment. *Id.* Without a significant deprivation such as loss of employment due to government restriction, the Sixth Circuit correctly applied *Paul v. Davis* in determining that the plaintiff had failed to invoke a liberty interest.

The plaintiff attempts to distinguish *Cutshall* further by arguing that under Tennessee law, Registry information was not made available on an Internet web site about all registrants, but was released on a case-by-case basis "as deemed necessary to protect the public concerning a specific sexual offender". Pl. Brief at 19, citing *Cutshall*, 193 F.3d at 471. This distinction does not diminish the split of authority on the due process issue between the Second Circuit and the Sixth. To the contrary, the Sixth Circuit found that no due process was necessary prior to the release of information regarding one particular registrant. *Id.* As Tennessee at the time did not have a Internet web site, this "release of information", or active notification by law enforcement, might carry to those receiving the information the implication of current dangerousness regarding that registrant more than would a registrant's inclusion on an Internet web site with hundreds of others.

The same is true in *Russell,* where the plaintiffs challenged more extensive notification. Washington distributed forms containing personal information as well as a summary of the crime to local schools, Block Watch Captains, and to the local media. 124 F.3d at 1082-83. Despite this much more likely to be stigmatizing notification, the Ninth Circuit found no liberty interest adhered to plaintiffs. Respondent presents a far less compelling claim, yet presently enjoys superior protection.

[6/] In *Russell*, the Ninth Circuit, while admittedly dispatching quickly the plaintiff's due process claim (as was appropriate), did indeed apply a due process analysis to Washington's SORA.

The result is a classic split among the circuits: citizens operating under the same Constitution and similar laws that have been adjudicated differently by different courts of appeals. This split is significant, and results from the efforts of all states to inform and protect their citizens, and not incidentally to comply with the federal government's announced policy and law doing the same. It is difficult to imagine a circuit split having more of a national impact than this case.

Respectfully submitted,
Petitioners,

*RICHARD BLUMENTHAL
ATTORNEY GENERAL

Gregory T. D'Auria
Associate Attorney General
Lynn D. Wittenbrink
Assistant Attorney General
55 Elm St.
Hartford, CT 06141-0120
Tel. No. (860) 808-5020
*Counsel of Record